United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1127

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO,

DEFENDANT-APPELLANT.

DOCKET No. 77-1127

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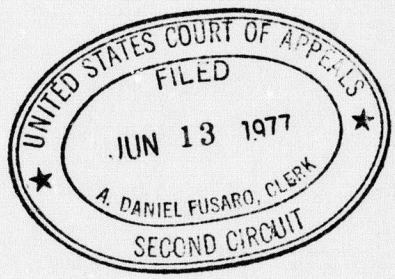
DEFENDANT-APPELLANT'S PRO SE
BRIEF ON APPEAL



DATED: This 9 day of June, 1977.

Respectfully submitted,

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DEFENDANT-APPELLANT'S PRO SE
BRIEF ON APPEAL

ISSUES PRESENTED FOR REVIEW

1. Whether the appellant's motion to dismiss the indictment with prejudice for lack of a speedy trial can be denied as moot by the court below based upon its former grant of a nolle prosequi, submitted by the Government nineteen (19) days after the appellant moved for dismissal, and not violate the Fifth Amendment due process clause?

2. Whether a federal prisoner removed on a writ of habeas corpus ad prosequendum is entitled to the same protection as that demanded by this Court for state prisoners in Mauro and Ford?

PRELIMINARY STATEMENT

This is an appeal from an Order entered in the Southern District of New York, Vincent L. Broderick, D.J., on December 28, 1976, denying as moot the appellant's pro se motion seeking dismissal of Indictment No. 76 Cr. 324 with prejudice for lack of a speedy trial; and because the Government prosecutor requested the return of the appellant, to Atlanta Penitentiary, before fulfilling the terms of the writ of habeas corpus ad prosequendum.

Timely Notice of Appeal was mailed on January 6, 1977, along with filing fee thereto. Docketing fee was mailed to this Court on or about March 8, 1977, and on March 18, 1977, said fee was received by this Court and Docket No. 77-1127 was assigned to the instant case. Briefs on appeal together with appendices were due to be filed no later than April 29, 1977. A thirty (30) days extension of time was duly sought on April 21, 1977, and on May 12, 1977, this Court extended the time until June 13, 1977. Therefore, this appeal is now properly before this Court.

BACKGROUND AND INTRODUCTION

On or about April 20, 1976, Indictment No. 76 Cr. 324 was ordered unsealed by Judge Brieant of the Southern District of New York. Said indictment named thirty-three persons in all as co-defendants, the appellant Leoluca Guarino inclusive, and contained Forty Counts. Counts One, Thirteen and Fourteen named the appellant herein.

Count One charged the appellant, along with thirty-two co-defendant, with conspiracy "to violate the narcotics laws of the United States, specifically, Sections 173, 174, 812, 841(a)(1) and 841(b)(1)(A), 951, 952 and 960 of Title 21, United States Code."

Count Thirteen charged the appellant with distribution and possession with intent to distribute a Schedule I narcotic drug controlled substance, viz., heroin.

Count Fourteen charged the appellant with distribution and possession with intent to distribute a Schedule I narcotic drug controlled substance, viz., heroin.

At the time that the aforesaid indictment was returned the appellant was confined in the Atlanta Federal Penitentiary, Georgia, pursuant to a judgment of conviction rendered in the Southern District of New York per Hon. Frankel, D.J., whereby the appellant was sentenced to 18 years imprisonment plus 3 years special parole upon conviction to violate the narcotics conspiracy law as well as with Four substantive counts. Consequently, a writ of habeas corpus ad prosequendum was required to remove the appellant to the Southern District of New York in order to answer to the indictment.

The Appellant's Removal From Atlanta Penitentiary.

On April 22, 1976, Hon. Charles Brieant, United States District Judge for the Southern District of New York signed and

issued a writ of habeas corpus ad prosequendum commanding the Warden of the Atlanta Penitentiary to have the appellant produced in the Southern District of New York on April 29, 1976, to appear and plead to Indictment No. 76 Cr. 324. The Writ also stated that

> "...immediately after the said LEOLUCA GUARINO shall have been discharged or convicted and sentenced on said indictment, that you return him to the Said Atlanta Penitentiary under safe and secure conduct, and have you then and there this writ." (Appendix, p. 6).

On April 29, 1976, the appellant appeared before Judge MacMahon in the Southern District of New York for pleading to the indictment and he attempted to enter a plea of double jeopardy which the court declined to accept and, instead, substituted a plea of not guilty on behalf of the appellant. Leonard Levenson, Esquire, was subsequently appointed as counsel by the court (Owens, J.), and on May 21, 1976, Mr. Levenson was relieved as counsel pursuant to the appellant's request. Thereafter Judge Owen entered an order allowing the appellant to proceed pro se. (See Docket Entry dated June 4, 1976, Appendix, p. 1).

On June 24, 1976, Judge Owens granted the appellant's pro se motion for severance along with two other co-defendants. (Appendix, p. 7-A). And on September 7, 1976 Judge Owens signed an order for the removal of the appellant from MCC and for his return to Atlanta Penitentiary, pursuant to the request of Assistant United States Attorney, Beller. (Appendix, p. 7). At that time

the appellant objected to his removal and return to Atlanta Penitentiary without having first been tried on the indictment, and he subsequently submitted letters and motions to this effect. (Appendix,p. 8, but see Motion To Correct Docket Entries, Appendix, p. 77, Par. (f)(g)).

Appellant's Return To Atlanta Penitentiary, And His Ensuing Pro Se Motions.

After being removed from MCC the appellant mailed numerous letters to the court below seeking to ascertain his status. These letters are not reflected in the docket entry sheet. (Appendix, pp. 1 thru 5). Upon failing to evoke a response to his various letters and motions the appellant, on December 2, 1976, submitted a pro se motion with accompanying memorandum of law for an order dismissing indictment No. 76 Cr. 324 with prejudice, on the ground that he was denied a prompt and speedy trial and upon the further ground that this Court's ruling in United States V. Mauro (544 F.2d 588) also mandated dismissal of the indictment inasmuch as he had been returned to the Atlanta Penitentiary at the Government's behest without having first been tried upon the indictment in contravention of the terms of the writ. (Appendix, pp. 9 to 17, inclusive).

On December 28, 1976, United States District Judge, Vincent L. Broderick, denied appellant's motion as moot because on December 28, 1976, it had (the court) granted leave to the Government to file an ex parte nolle prosequi as to indictment No. 76 Cr. 324.

On January 6, 1977, the appellant wrote to the lower court requesting a copy of the Government's nolle prosequi, (Appendix, p. 22), and he received same on January 17, 1977. (Appendix, p. 25).

On January 21, 1977, the appellant submitted a motion with appended affidavit in support thereof seeking a vacature of the district court's order granting the nolle prosequi and for the court to substitute an order dismissing indictment No. 76 Cr. 324. (Appendix, p. 41). That same evening the appellant received a copy of the Government's memorandum of law in support of its nolle prosequi, (Appendix, p. 29), and on January 26, 1977, he submitted a memorandum of law in support of his motion and affidavit for the court to vacate its former order of December 28, 1976. (Appendix, p. 47).

Five days after the appellant submitted the motion to dismiss the indictment he submitted a motion pursuant to Rule 36, Federal Rules of Criminal Procedure, seeking an order to correct the docket entries. (Appendix, p. 74). This motion was submitted on December 7, 1976, and alleged many omissions and errors in the docket entries, (Appendix, p. 74). These errors and omissions were conceded to by the Government. (Appendix, p. 31). This motion was denied as moot by the lower court upon a memorandum decision dated January 5, 1977. (Appendix, p. 5). The appellant has never teceived the decision itself.

In preparation for the instant appeal the appellant submitted papers pursuant to Rule 10, Federal Rules of Appellate Procedure, designating the portions of the record on appeal to be transcribed and forwarded to this Court. (Appendix, p. 71).

The Government's Nolle Prosequi And Its Time Sequence When Compared With The Appellant's Motion To Dismiss.

Nineteen days after the appellant moved to dismiss with accompanying memorandum of law in support the Government prosecutor sought leave to file a nolle prosequi as to the appellant and two other co-defendants. Pointing out to the trial court that the appellant as well as the two co-defendants, CAPRA and DELLACAVA, had previously been convicted in Indictment No. S73 Cr. 460, of conspiracy and substantive violations of the narcotic laws, with the conspiracy count reversed on appeal because of illegal wiretaps, the Government then went on to say that

> "(c)ertain wiretap evidence against the co-defendants in 76 Cr. 324 who remain to be tried is inadmissible against the defendants CAPRA, GUARINO and DELLACAVA, and would be prejudicial if admitted in a joint trial even with limiting instructions. Consequently, severance and a third trial may be required to permit the Government to introduce this evidence against the codefendants. Further, even were these defendants convicted of conspiracy, the sentencing judge in 76 Cr. 324 would be required to determine whether the conspiracy here charged is distinct from that charged in Indictment S73 Cr. 460, before imposing any additional term of imprisonment beyond that which CAPRA, GUARINO and DELLACAVA are already serving." (Appendix, p. 26).

The above position was predicated upon the fact that this Court, in United States V. Capra, et al. (501 F.2d 267), reversed the conspiracy conviction because of illegal wiretapping. And the appellant's initial efforts to plead double jeopardy when arraigned on indictment No. 76 Cr. 324 was motivated by this same factor. This argument was subsequently advanced by the appellant on numerous occasions via oral and written motions. (See e.g., Appendix, pp. 61 to 70, inclusive).

The appellant's motion to vacate the granting of the nolle prosequi respectfully pointed out to the court below that granting the Government leave to nol pross nineteen days after the appellant moved to dismiss for failure to timely prosecute him is a denial of due process of law as envisioned in The Speedy Trial Act of 1974. (Appendix, pp. 41 to 45, inclusive).

The Appellant's Removal From Atlanta Penitentiary Via The Second Writ Of Habeas Corpus Ad Prosequendum.

On or about December 7, 1976, United States District Judge, Constance B. Motley, signed and issued a writ of habeas corpus ad prosequendum which required the presence of the appellant at the Southern District Courthouse for trial on December 10, 1976. (Appendix, p. 18; see also Docket Entries, p. 4). The writ was issued five days after the appellant submitted his motion to dismiss the indictment for lack of a speedy trial and on Mauro grounds.

On or about December 9, 1976, the appellant was again removed from the Atlanta Penitentiary to answer to said writ, and he was taken to Petersburg Reformatory (for overnight lodging). Upon his arrival there he was informed by the institutional authorities that he would be returned to Atlanta because the writ had been voided per instructions of Assistant United States Attorney, Beller. (Appendix, p. 19).

POINT I

THE DENIAL, AS MOOT, OF APPELLANT'S MOTION TO DISMISS THE INDICTMENT FOR LACK OF A SPEEDY TRIAL IS A DENIAL OF DUE PROCESS OF LAW, PARTICULARLY WHEN THE MOOTNESS IS POSITED ON THE LOWER COURT'S GRANTING THE GOVERNMENT LEAVE TO NOLLE PROSS NINETEEN DAYS AFTER SUBMISSION OF THE MOTION TO DISMISS.

This is a case of first impression whose resolution will go far towards purifying the well of American justice--as administered within this circuit. In particular, it involves the prejudicial impact flowing from a lower court's grant of a nolle prosequi nineteen days after the appellant moved for a dismissal with prejudice because of the Government's failure to afford him a prompt and speedy trial. In this regard recourse to the congressional intent as well as the legislative history of The Speedy Trial Act of 1974 may prove helpful.

The Speedy Trial Act of 1974 delineated a procedure that was calculated to serve both societal interests and the rights of a defendant. Heavy emphasis was laced on evident due process violations that necessarily flow from delay and the obvious ineffectiveness of rehabilitative programs:

> ". . .from the defendant's point of view, delay is not synonymous with due process. A defendant who is required to wait long periods to be tried suffers from a magnitude of disabilities which in no way contribute to his well being. If he is incarcerated awaiting trial, unecessary delay in the commencement of trial could result in irreparable injury... and further retard the rehabilitative process." (U.S. Code Congressional and Administrative News, P.L. 93-619, p. 7408).

Correction for delays was sought as follows:

> "Dismissal with prejudice
>
> In the event that the time limits of the bill, subject to the various exclusions, are not met, the court on motion of the defendant may dismiss the complaint, information or indictment against the individual. This sanction applies to both the period between arrest and indictment and between indictment and trial. The effect of dismissal would be to bar any future prosecution against the defendant for charges arising out of the same conduct. Dismissal with prejudice would apply to those offenses which were known or reasonably should have been known at the time of dismissal. A defendant must move to dismiss the case prior to trial, entry of a plea of guilty or nolo contendre, or he waives the right of dismissal with prejudice on grounds that the requirements of this legislation were not met. (Section 3162(a))
>
> "Sanctions are also provided for attorneys, either for the defense or the Government, who intentionally delay the proceedings. The penalties include a reduction in compensation or a fine, or suspension from practice before the court for up to 90 days. (Section 3162(b))" (Id. at p. 7416).

The sanction proviso merely underscores the seriousness that the Congress viewed any attempt to tamper with an accused's right to a prompt and speedy trial, especially in a situation where, as in the case at bar, the appellant moves for a dismissal but trough Government machinations the appellant's invocation of a proper remedy is aborted--on a ploy solely designed to salvage their case for future prosecution. A ploy that flies in the face of Congressional intent.

Singularly apropos is the former Assistant Attorney General, William H. Rehnquist, remarks to the Senate Subcommittee on Constitutional Rights in 1971:

> "None of us interested in the administration of criminal justice, Mr. Chairman, whether within or without the bench and bar, can fail to be struck by the stark fact of intolerable delays in our system of administering criminal justice. The Department (of Justice) is of the view that some of the root causes of this unjustifiable delay must be sought out, identified, and dealt with, regardless of whether the solution for any particular facet of the problem tends to hear (sic) more heavily on one side of the criminal justice equation than the other.
>
> "Therefore, we are unwilling to categorically oppose the mandatory dismissal provision. For it may well be, Mr. Chairman, that the whole system of Federal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill. (Senate Hearings, p. 96)" (Ibid. pp. 7413-7414).

In passing the Act the Congress enacted a phase-in-period that would minimize confusion and expedite its implementation. To this end 18 U.S.C., Sec. 3161(g), directs as follows:

> "Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve month period such time limit shall be one hundred and twenty days,....." (Emphasis added).

In the case at bar the appellant was severed from the main body of the alleged co-conspirators on June 24, 1976, and on July 1, 1976, the one hundred and twenty day implementation clause of The Speedy Trial Act went into effect. And on December 2, 1976, the appellant moved to dismiss the indictment with prejudice for failure to afford him a speedy trial, albeit not with the technical precision of an accomplished and polished attorney who would have cited chapter and verse. (But see Haines V. Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972)).

Parenthetically, it should be noted that the Government did not move to nolle pross until fifty-seven (57) days after the statutory limit of 120 days for trial had expired, i.e., on December 21, 1976. And the fact that the Government sought a second writ evinces a clear desire to try the appellant. (Appendix, p. 18). A desire that was blocked by the appellant's motion to dismiss, the receipt of which caused the Government to void the writ and instead seek to nolle pross in an effort to save their case for future prosecution.

The appellant respectfully submits to this Honorable Court that the Government prosecutor's tactics are solely designed to strip him of his constitutional rights to due process of law and that if allowed to stand effectively emasculate the intent of Congress by rendering The Speedy Trial Act meaningless. As was articulated in the legislative history thereto:

"Pursuant to questions that arose during discussion of the dismissal sanction, several points with respect to H.R. 17409 deserve clarification: first, as already indicated above, dismissal is mandatory but not automatic, since the defendant is expressly required under Section 3162(a)(2) to move for dismissal if not brought to trial within the prescribed time; second, it should be clear that the Attorney for the Government is free to contest the granting of a motion to dismiss on the basis of error by noting his exceptions and taking appeal in the proper manner;....." (U.S. Code Congressional and Administrative News, P.L. 93-619, p. 7431, emphasis in original).

The Government did not claim any excludable time period within the provisions of 18 U.S.C., Section 3161(h), nor can they. Instead, the Government seeks to subvert the clear intent of the Congress:

"Although the Committee believes that under the Senate version it would be unlikely that a great many cases would be reprosecuted, the potential for such occurrences exists. In addition, two witnesses--Mr. Charles Morgan, Washington Director of the American Civil Liberties Union, and Mr. Barris--added that as they read the decision, the Supreme Court's holding in Strunk V. United States, 412 U.S. 434 (1973), requires dismissal as the only appropriate remedy in cases where the right to speedy trial is abridged, despite the extreme nature of the remedy. With respect to the propriety of requiring a permanent bar to future prosecution, the Committee adopts the position of the American Bar Association as stated by the Advisory Committee on their Commentary on Standards Relating To Speedy Trial:

'The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution

> again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay. (Ibid, p. 7430).

It is against this background that the lower court ruled that the "(d)efendant Guarino's pro se motion seeking an order dismissing with prejudice the instant indictment as to him is therefore denied as moot....." and that "the Court....has satisfied itself that the nolle prosequi is not being used to circumvent the time requirements of the Speedy Trial Act, 18 U.S. C. Section 3161, et seq." (Appendix, p. 20).

The question now arises whether the lower court's finding of mootness rests on a solid foundation. The appellant respectfully submits that it does not.

The leading case on mootness is St. Pierre V. United States, 319 U.S. 41 (1943), where the Supreme Court held that it was without the requisite jurisdiction to review the merits of the case because the defendant had completed the sentence imposed. The Court also observed that the sentence and conviction could have been reviewed before expiration, but that St. Pierre had sought no stay or supersedeas. Implicit in the Court's ruling is the fact that an exception to mootness lies in a situation where a defendant who makes all possible efforts to have the order of confinement reviewed before release, even though no longer in custody, will receive a judicial determination on the merits of

the case. Crystallization of this sound reasoning was manifested in Sibron V. New York, 392 U.S. 40 (1968). In this latter case the Court found that Sibron had taken "all steps to perfect his appeal in a prompt, diligent and timely manner." Consequently, his release after completion of his sentence did not moot his appeal. An effort, therefore, emerges as a clear exception to the mootness doctrine. Another exception to the mootness doctrine is the "capability of repitition" test. (See Roe V. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Nebraska Press, Association V. Stuart, 427 U.S. 539 (1976); and United States V. Schiavo, 504 F.2d 1 (3rd Cir. 1974) en banc).

In Nebraska Press Association the Court recognized that jurisdiction to review the merits of the case is not defeated "if the underlying dispute between the parties is one 'capable of repitition, yet evading review'", citing Pacific Terminal Co. V. ICC, 219 U.S. 498, 515 (1911). This is the same reasoning that compelled the Court, in Fiswick V. United States, 392 U.S. 211 (1946), to reach the merits when it perceived that significant collateral consequences could accrue to the defendant. (But see Note, Cases Moot on Appeal, 103 U.Pa.L.Rev. 772 (1955)).

Significantly, a nolle prosequi unlike a dismissal with prejudice leaves the Government with the option to reinstitute and renew its prosecution at a future date, hence it is clearly "capable of repitition".

The Third Circuit Court of Appeals in United States V. Frumento (In re Pisciotta), 21 CrL 2004, recently had occasion to rule on the "capability of repitition" test. Pisciotta, a former Philadelphia judge, refused to testify against his co-defendants notwithstanding that he had been granted immunity and he was cited for contempt under 28 U.S.C., Section 1826(a), and ordered confined until he purged himself of the contempt or the co-defendant's trial had ended. Pisciotta sought a stay of the confinement order which was denied by the Third Circuit Court of Appeals. In the process of seeking en banc review of the denial of the stay, and while pressing his direct appeal, the co-defendants' trial ended and the en banc court dismissed the stay motion as moot. Subsequently, the Third Circuit granted en banc consideration for the direct appeal.

On en banc the Government argued that Pisciotta's appeal from the contempt order had been mooted by virtue of the completion of his co-defendants' trial. The appellate court disagreed, holding that:

> "(W)e perceive no difference between Pisciotta's exposure to future grand jury or court proceedings and the circumstances forseen by the Supreme Court in Nebraska Press in the event a new trial was ordered and a new gag order was imposed. Indeed, we need not speculate with respect to Pisciotta's future grand jury involvements, for the government has already subpoenaed Pisciotta once to give grand jury testimony, and has indicated an intention to call him again. Further, we are mindful that appeals may be taken by Pisciotta's codefendants, which may result in new trial proceedings at which Pisciotta's testimony will be required.
> .....

> "Even if we could not construct or project any 'capability of repitition' in this case, we would nevertheless decline to dismiss Pisciotta's appeal as moot.
>
> "While in each of the instances discussed, the Supreme Court has determined that 'capability of repitition' existed, we are of the view that such capability was perceived so as to satisfy the true governing consideration behind the Court's decision--that of having review available when significant interests are at stake....." (Ibid, at p. 2005).

Accordingly, this Honorable Court is now presented with the question of whether, under the totality of circumstances hereinabove enumerated, the Government may, consistent with due process, nolle pross a case <u>after</u> the appellant moved to dismiss for failure to afford him a speedy trial. And, additionally, whether the granting of the nolle prosequi exposes the appellant to the inherent dangers of the "capability of repitition" test.

POINT II

EQUAL PROTECTION OF THE LAWS REQUIRES THAT A FEDERAL PRISONER REMOVED ON A WRIT OF HABEAS CORPUS AD PROSEQUENDUM BE ACCORDED THE SAME PROTECTION THAT THIS COURT HAS DEMANDED FOR STATE PRISONERS IN MAURO AND FORD.

Indictment No 76 Cr. 324 was a sealed indictment that was unsealed on or about April wO, 1976. The appellant and thirty-two co-defendants were named in said indictment for various alleged violations of the Controlled Substance Act of 1971, as well as for the old narcotics laws. At the time that the indictment was unsealed the appellant was confined in the Atlanta Federal Penitentiary, Georgia, upon a prior judgment of conviction issued out of the Southern District of New York, Marvin Frankel, District Judge, sentencing the appellant to eighteen (18) years imprisonment plus three (3) years special parole.

On April 22, 1976, United States District Judge, Charles L. Brieant, Jr., of the Southern District of New York signed a writ of habeas corpus ad prosequendum for the removal of the appellant from Atlanta and for his production before the court. (See Appendix, p. 6).

In compliance with the writ of habeas corpus the Warden of the Atlanta Penitentiary released the appellant to the U.S. Marshalls for transportation to the jurisdiction of the Southern District of New York, and on April 29, 1976, the appellant appeared before Judge MacMahon for arraignment. After arraignment the case was adjourned and referred to Judge Owens.

On May 7, 1976, the appellant appeared before Judge Owens and the court adjourned the cause of action. Thereafter the appellant made many court appearances, some of which are reflected in the docket entries (Appendix, pp. 1-2), but it was not until on or about June 24, 1976, that the court granted the appellant a severance. And on September 7, 1976, the trial court cetified that the "Writ (was) satisfied...(a)s per AUSA Beller". (See Appendix, p. 7).

During the interim period from severance to the day that the writ was signed as "satisfied" the appellant had been lodged in the MCC, and when informed that he was being returned to Atlanta he twice phoned the trial court's clerk, Mark Stein, and apprised him that the terms of the writ of habeas corpus ad prosequendum were being violated by ordering his return without the appellant having first been "discharged or convicted and sentenced on said indictment", which were the terms of the writ. (Appendix, p. 6). Consequently, the appellant sought and requested written clarification as to his status--none was forthcoming.

At about this same period of time the appellant voiced his objections to being removed from MCC to Mr. Abe Rivera, Counsellor, at said MCC, and Mr. Rivera phoned the trial court to ascertain whether indeed the writ had been satisfied and was "so advised writ satisfied and will put (the appellant) on next bus

for return to USP Atlanta." (Appendix, p. 7).

On or about September 9, 1976, the appellant submitted a letter/motion objecting to his removal from the MCC as violative of the conditions of the writ of habeas corpus ad prosequendum, this letter motion is not noted in the docket entries. (Appendix, p. 77, par. (f)(g)).

On or about September 17, 1976, the appellant submitted another letter/motion, from the segragation unit of the Petersburg Reformatory, reiterating the issues above indicated, this letter/motion is not noted in the docket entries. (Appendix, p. 77, par. (g)).

Finally, on or about October 1, 1976, the appellant submitted a letter/motion seeking to determine the status of the writ of habeas corpus ad prosequendum, and an itemized listing of all letter/motions received by the trial court as well as the disposition of each. Again, this latter effort to clarify the appellant's position is not reflected in the docket entries nor has the lower court ever ruled upon them. (Appendix, pp. 1-5).

In light of this factual background the appellant respectfully directs this Court's attention to its recent holdings in United States V. Mauro, 544 F.2d 588 (1976), and United States V. Cyphers, ____ F.2d ____, Dkt. Nos. 76-1131, 76-1160, decided February 8, 1977. In Mauro this Court held that a state prisoner who was returned to the state authorities without having first been tried on the charges for which the requesting state obtained

not thereafter be tried for the charges which formed the basis of his removal in the first instance, and that the outstanding indictment would be dismissed with prejudice.

Mauro, was serving a sentence in New York State, and he was brought down to the Eastern District of New York to answer to a pending federal indictment. His removal from state custody was effectuated pursuant to The Interstate Agreement On Detainers Act; however, Mauro, as well as a co-defendant, were returned to state prison without having been tried on the federal indictment. Subsequently, the Government again sought custody of Mauro and, as on the first occasion, removed him from state custody via a wirt of habeas corpus ad prosequendum. Mauro motioned to dismiss the indictment with prejudice on the grounds that the Government had violated the terms of The Interstate Agreement On Detainers Act when they returned him the first time without having tried him. The district court, Bartels, J., agreed and dismissed the indictment with prejudice. On the Government's appeal this Court ruled that:

> "...We conclude that the writ of habeas corpus ad prosequendum is a detainer entitling the state inmate to the protection provided in Article IV and specifically to a trial before his return to the State institution." (United States V. Mauro, 544 F.2d 588, 592).

And in Cyphers, supra, this Court ordered the indictment"dismissed with prejudice" against Ferro, a co-defendant, because of a similar situation as in Mauro, supra.

Similarly, in United States V. Ford, 550 F.2d 732, this Court cited its recent holding in Mauro, supra, "that a writ of habeas corpus ad prosequendum constitutes a 'detainer'". Interestingly, the Ford opinion was written by Judge Mansfield, the same judge who dissented in Mauro.

While it is true that the above cases primarily revolved around the Interstate Agreement On Detainers Act, it is equally true that this Court has equated a writ of habeas corpus ad prosequendum with a detainer that once issued must conclude with the final adjudication of the outstanding cause of action and that anything less demands the dismissal of the indictment with prejudice.

A natural corollary to the above is that when a federal prisoner is removed from federal prison via a writ of habeas corpus ad prosequendum that he too must be tried before being returned to the custody of the warden who originally released him to answer to the writ. To require a different result would be a denial of the equal protection of the law concept inherent in the due process clause of the Fifth Amendment.

In this regard it is essential to note that the Supreme Court has held that:

> "The Fifth Amendment...does not contain an equal protection clause....But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit

> "safeguard of prohibited unfairness.....as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.
>
> "In view of our decision that the Constitution prohibits the states from maintaining racially segragated schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." (Bolling V. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954)).

That the present case arises in a setting of a criminal nature as opposed the civil rights setting of the Bolling case is irrelevant. Germane to the case at bar is the underlying rationale that compels the Federal Government to apply equal protection of the laws evenhandedly, i.e., across the board. Hence, what is prohibited to the Government in a federal-state situation is equally prohibited to the Government in a federal-federal situation. Anything less would be an anomaly of due process. For to permit the Government to employ different standards to those mandated by Bolling, supra, and those articulated by the Mauro Court would do violence to equal protection of the laws concepts. (See Shapiro V. Thompson, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322, 1335 (1969), citing Bolling, supra, and Schneider V. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 218 (1964)).

CONCLUSION

WHEREFORE, the order appealed from should be reversed and the district court should be ordered to dismiss the instant indictment with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE
BY MAIL

STATE OF GEORGIA)
) SS:
COUNTY OF FULTON)

LEOLUCA GUARINO, after being duly by law sworn, deposes and says: that on this day of June, 1977, he mailed a copy of the instant brief and appendix to the United States Attorney's Office for the Southern District of New York. All of which should constitute sufficient proof of service.

Yours etc.,

Leoluca Guarino

Leoluca Guarino #78281
Defendant-Appellant, pro se

Sworn to before me this
7 day of June, 1977.

Charles C. Moore

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).